Supreme Court, U.S.
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No. 03-909

IN THE

Supreme Court of the United States

JEAN MARIE LOUIS,

Petitioner,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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This petition asks the Court to clarify whether federal courts of appeals have jurisdiction to consider substantial constitutional challenges to a Board of Immigration Appeal's ("BIA's") final removal order where the petitioner is a "criminal alien"—an alien removable based on a criminal conviction enumerated in 8 U.S.C. § 1252(a)(2)(C). As demonstrated in the petition (Pet. 8-15), there is a deep and persistent circuit split on this issue: the Ninth and Third Circuits have concluded that jurisdiction does not exist, while the Seventh, Eighth and Eleventh Circuits, as well as the Executive Branch of the United States, have reached the opposite conclusion. As the petition further showed (Pet. 13, 17-18, 18-21), the judicial conflict should not be allowed to persist given the significant differences between direct and habeas review and the procedural disuniformity the split is causing.

Importantly, respondent largely *concedes* these arguments. It agrees "that Section 1252(a)(2)(C) does not deprive a court of appeals of jurisdiction to review a substantial constitutional claim" and that the Third Circuit's contrary interpretation of § 1252(a)(2)(C) is erroneous. Opp'n 5. It further recognizes that "there does appear to be a circuit conflict on that issue." *Id.* Respondent contends, however, that the question presented is not "sufficiently important to justify this Court's intervention" and that this case is not "an appropriate vehicle" for reviewing it. *Id.* at 5. These arguments are demonstrably wrong.

I. THE PETITION RAISES A SIGNIFICANT JURISDICTIONAL QUESTION.

Respondent's principal argument (Opp'n 5-6) is that the significance of the question presented has "greatly diminished" since the Court issued its decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). According to respondent, because *St. Cyr* holds that criminal aliens may file a petition for a writ of habeas corpus, the only issue presented is *where* the alien

must file, not *whether* judicial review is available. Opp'n 6. But respondent's argument ignores both the real differences between habeas and direct review and the deleterious effects of non-uniformity in the lower courts. Indeed, the argument fails to acknowledge that a federal question about the jurisdiction of the lower courts is by *necessity* a substantial legal issue.

First, contrary to respondent's argument (Opp'n 6), the question presented concerns more than simply where aliens should file. Rather, as explained in the petition (Pet. 15), the question presented impacts the scope of review available to criminal aliens, whether the alien must be "in custody" to receive judicial review (*id.* at 16), and the speed with which aliens can receive a final determination of their constitutional claims (*id.*)—all of which are of tremendous practical importance to aliens and the government alike. Indeed, the Executive Branch itself has repeatedly asked (including in the proceeding below) the Third and Ninth Circuits to reconsider their interpretation of § 1252(a)(2)(C) and exercise jurisdiction over the substantial constitutional claims of criminal aliens. Pet. 13-14. Notwithstanding respondent's convenient denials here, the question presented is obviously one of great practical and legal significance.

Second, respondent has not, and cannot, deny that the courts of appeals' divergent interpretations of their jurisdiction under § 1252(a)(2)(C) has caused them to adopt non-uniform procedures governing review of a criminal alien's substantial constitutional claims. Pet. 16-17. Yet procedural uniformity and efficient judicial administration, in and of themselves, are of substantial practical importance to the federal courts. In recognition of this fact, this Court routinely grants *certiorari* to resolve conflicts raising jurisdictional or procedural questions—even in cases that involve only questions of "where" or "when" to file. *See, e.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 202-03 (1999) (deciding whether sanction order was immediately

appealable or appealable only after final judgment rendered); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582-83 (1999) (deciding whether courts must consider jurisdictional arguments in a particular order); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 869 (1998) (deciding whether party was required to file initially with arbitration panel or with district court); *Mississippi v. Louisiana*, 506 U.S. 73, 75 (1992) (deciding where party was required to file initially, with district court or with Supreme Court). *See also* Robert L. Stern *et al.*, SUPREME COURT PRACTICE 253-54 (8th ed. 2002) (observing that Court frequently grants *certiorari* to decide questions of federal practice as part of supervisory power).

This procedural disuniformity, moreover, is causing aliens inadvertently to lose their constitutional claims, *see, e.g.*, *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 680-81 (7th Cir. 2003) (dismissing criminal alien's constitutional claims asserted in habeas proceeding on ground that alien failed to raise them in a petition for direct review to the court of appeal), and/or to clog the courts with redundant petitions out of an "abundance of caution." Pet. 16. This Court's review is thus necessary to end this procedural confusion.

II. THE PETITION IS AN APPROPRIATE VEHICLE TO DECIDE WHETHER FEDERAL COURTS OF APPEALS HAVE JURISDICTION TO REVIEW A CRIMINAL ALIEN'S SUBSTANTIAL CONSTITUTIONAL CLAIMS.

Respondent also wrongly suggests that this petition is not a suitable vehicle for deciding the question presented, because petitioner supposedly (i) has failed to exhaust administrative remedies and (ii) can assert no meritorious constitutional claim. These arguments are both irrelevant and erroneous.

As an initial matter, respondent's "vehicle" arguments are misplaced. The lower court did not rule on, or even consider, respondent's exhaustion or merits-based claims. Pet. App. 1a-2a; Pet. 17-18. Indeed, respondent did not even raise its

exhaustion argument below. Thus, there is no alternative lower court holding for this Court to consider. On the contrary, the decision below rests *only* on the threshold jurisdictional question that is dividing the courts of appeals. *See* Pet. 17-18.

Moreover, respondent has not identified a true "vehicle problem" because neither its exhaustion nor merits-based arguments—even if true—could preclude the Court from deciding whether § 1252(a)(2)(C) strips the federal courts of appeals of jurisdiction over substantial constitutional claims. At best, respondent has identified new arguments that some court will need to consider before deciding Louis' claims. But because there is no legally-compelled "sequencing of jurisdictional issues," this Court is free to "choose among threshold grounds for denying audience to a case on the merits" and thus can leave these other arguments for the court of appeals' resolution on remand. *Ruhrgas AG*, 526 U.S. at 584-85.

In accord with the principle that it is free to leave alternative arguments for remand, this Court has in numerous instances granted petitions that present a jurisdictional question dividing the lower courts even though other threshold issues, including other jurisdictional arguments, could be advanced on remand and ultimately preclude review of the petitioner's claim. *See, e.g.*, *id.* at 582-83 (considering whether federal courts can determine personal jurisdiction in advance of subject matter jurisdiction, even though petitioner's claims would inevitably be dismissed on personal jurisdiction grounds); *Edelman v. Lynchburg College*, 535 U.S. 106, 119 (2002) (considering whether petitioner's failure to timely file form with EEOC was a bar to exercise of jurisdiction even though district court had dismissed on alternative jurisdictional ground that the form was not otherwise proper). *See also* Opp'n of United States in *Clay v. United States*, No. 01-1500, at 11-12 (June 7, 2002), *cert. granted* June 28, 2002 (unpersuasively arguing that Court

should deny petition in light of other threshold bars); Opp'n of United States in *Nguyen v. United States*, Nos. 01-10873 & 02-5034, at 7-8 (Sept. 30, 2002), *cert. granted* Nov. 4, 2002 (unpersuasively arguing denial appropriate because petitioner had waived right to contest threshold requirement). Indeed, this Court's jurisprudence suggests that the question presented should be decided *before* respondent's alternative arguments, because to resolve the latter, the Court would have to determine the merits of Louis' constitutional claims. *See infra* pp. 5-8. But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) (courts must resolve questions of subject matter jurisdiction, like the question presented, before arguments concerning the merits of a claim).

In all events, the "alternative" arguments that respondent identifies are erroneous.

First, respondent's exhaustion argument (Opp'n 6-8)—raised for the first time in its opposition—is wrong. There is a well-recognized "exception to the exhaustion requirement . . . carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures." *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994). "Because the BIA has no jurisdiction to adjudicate constitutional issues, the Act's exhaustion requirement does not preclude petitioners from raising them for the first time before the Court of Appeals." *Id. See also Singh v. Reno*, 182 F.3d 504, 511 (7th Cir. 1999) ("[C]onstitutional due process claims—like the one raised here—may not require exhaustion because there has been a showing that the BIA could not deal dispositively with the matter."); *Nehme v. INS*, 252 F.3d 415, 421 (5th Cir. 2001) ("The BIA does not have jurisdiction to decide the constitutionality of the acts of Congress. Therefore, Nehme would not be required to have exhausted

his constitutional arguments before the BIA.") (internal citations omitted).

The cases on which respondent relies for the contrary proposition (Opp'n 7-8) are inapposite. Those cases expressly acknowledge the "exception to the exhaustion requirement for constitutional challenges to statutes and to the administrative rules of procedure." *Silva-Calderon v. Ashcroft*, 358 F.3d 1175, 1177 (9th Cir. 2004); *see also Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("We recognize that the principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.") (footnote omitted); *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) ("There are some claims of denial of due process or deprivation of constitutional rights that are exempt from this exhaustion requirement because the BIA has no power to address them."); *Liu v. Waters*, 55 F.3d 421, 425 (9th Cir 1995) ("[T]he BIA lacks jurisdiction to decide questions of the constitutionality of governing statutes or regulations.").

They hold only that where the BIA has committed some procedural error within its competence to correct, it should be given an opportunity to correct the error. Louis, however, is not claiming that the BIA committed a procedural error of constitutional dimension, but challenges the constitutionality of the regulations that allowed him to be stripped of his removal rights without notice and after his case was closed, as well as the constitutionality of respondent's acts. *See infra* pp. 7-8.

In addition, this Court has recognized that statutory exhaustion requirements do not apply to claims "wholly collateral" to an agency's review and outside of "the agency's expertise." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994). *See also Singh*, 182 F.3d at 510 (where constitutional challenge concerned timeliness of INS's actions, not BIA review itself, exhaustion requirement did not

apply). Here, the issue is not the propriety of the BIA's review, but the "wholly collateral" issue of the constitutionality of respondent's notice and the prevailing regulations, neither of which is in the BIA's jurisdiction, let alone its "expertise."

Second, Louis can assert a cognizable constitutional claim. As this Court has observed, a constitutional claim can be dismissed as a jurisdictional matter only where the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974); *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959). There is no precedent of this Court that would foreclose Louis' argument that (i) respondent's notice was constitutionally defective; (ii) the governing regulations which allow the BIA to reopen a case without actual notice to an alien are constitutionally defective; and (iii) the regulations allowing the BIA to reopen closed cases at any point in the future based solely on a change in law are unconstitutional.

Importantly, respondent says nothing whatsoever about Louis' last two constitutional claims. Thus, it would be wholly inappropriate at this point to speculate about their merit.

With respect to its arguments on Louis' first constitutional claim (Opp'n 8-11), respondent identifies no decision of *this* Court that would foreclose or render "implausible" Louis' claim that his right to due process was violated. Its citation (*id.* at 9) to a single First Circuit decision (holding that due process does not require notice to an alien) is simply insufficient to render Louis' claim implausible, as this Court has recognized that "[a]n elementary and fundamental requirement of due process in *any* proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis supplied). *See also U.S. ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process . . . ."). Respondent's suggestion that any constitutional infirmity could be resolved by reopening the case (Opp'n 9), moreover, is inconsistent with this Court's holding in *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965), that the availability of motions to reconsider cannot cure a constitutionally defective notice where, as here, it is harder to prevail on such a motion.

Finally, respondent is wrong to claim that Louis must demonstrate prejudice. In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), this Court rejected the argument that a party deprived of notice of a proceeding has no constitutional claim if that party would have inevitably lost, calling it constitutionally "untenable." *Id.* at 85. In all events, had Louis been given notice of respondent's motion to reopen the case, he could have argued that there were insufficient grounds to reopen the proceeding. *See* 8 U.S.C. § 1229a(c)(6)(B). And if Louis were correct that the proceeding against him could not have constitutionally been reopened, the BIA's decision would have to be vacated as *ultra vires*. Accordingly, Louis can demonstrate prejudice.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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